
(2004) 04 PAT CK 0101
In the Patna High Court
Case No : L.P.A No. 1177 of 2003

Shailendra Kumar Singh and Another	APPELLANT
Vs	
State of Bihar and Others	RESPONDENT

Date of Decision : 28-04-2004

Acts Referred:

Citation : (2004) 04 PAT CK 0101

Final Decision : Dismissed

Judgement

1. All the three appeals are directed against a common order dated 22.10.2003, passed by the learned Single Judge in batch of the writ applications, by which he has rejected the prayer of the Appellants to quash the notification dated 21.2.2002, issued u/s 3(3) of the Bihar Ancient Monuments and Archaeological Sites Remains and Art Treasures Act, 1976 (hereinafter referred to as "the Act"), declaring Pretshila hills, an archaeological monuments situated in the town of Gaya as protected area as well as their prayer to restrain the Respondent-authorities from preventing them from carrying mining operations on plots No. 1156 under Khata No. 62 (new plot No. 1748) and Plot No. 94 under Khata No. 67 (new plot No. 315), situated in villages Kewali and Aradih, respectively.

2. L.P.A. No. 1177 of 2003 arises out of C.W.J.C. No. 5351 of 2002, L.P.A. No. 1192 of 2003 arises out of C.W.J.C. No. 13382 of 2002 and L.P.A. No. 1218 of 2003 arises out of C.W.J.C. No. 6902 of 2002. The documents hereinafter will be referred to annexures mentioned in C.W.J.C. No. 5351 of 2002 and the L.P.A. arising out of the said case.

3. The town of Gaya is one of the important places of pilgrims for the persons professing Hindu religion and it is known as Gaya Dham. Its surrounding hills are known as Ramshila hills, Brahmyoni hills and Pretshila hills. The Hindu pilgrims visit the religious places and the said hills for performing their religious rites, Shradh and for offering Pind and in such course they also move around (Parikrama) the hills. Admittedly, the said hills along with other hills, were declared as archaeological monuments vide notification dated 21.1.1981 and

there is no controversy about the same.

4. The controversy is with regard to declaration of protected area of Pretshila hills. Appellants challenged the inclusion of aforesaid two plots as the protected area, over which they carry on their mining operations.

5. Section 3 of the Act provides that in case the State Government is of the opinion that any ancient monument or archaeological site and remains requires protection under the Act, then by notification, it will disclose its intention to declare such ancient monument or archaeological site and remains to be a protected monument or a protected area, as the case may be, and said notification shall be published in the manner as prescribed u/s 3(1) of the Act. Sub-section (2) of Section 3 provides that any person interested in any such ancient monument or archaeological site and remains may, within two months after the issue of the notification, object to the declaration of the monuments or the (sic) site and remains, to be a protected monument or a protected area. Sub-section (3) of Section 3 provides that the State Government may, after considering the objections, if any, received by it, declare by notification in the Official Gazette, the ancient monument or the archaeological site and remains, as the case may be, to be a protected monument or a protected area.

6. The State Government, by a notification dated 1.3.1985, published on 12.3.1985 in the Bihar Gazette (extra-ordinary), as contained in Annexure 3, issued a preliminary notification in terms of Section 3(1) of the Act for declaration of protected area with regard to Pretshila hills and other hills. Two plots, with regard to which claims have been made by the Appellants, were also included in the protected area. One Mukhiya of Kujapi Gram Panchayat raised objection. Thereafter, it appears that notification was issued" on 14.8.1986 (Annexure 4) defining the Pretshila hills, Brahmjoni hills and other hills. In that notification, the aforesaid two plots were not included. Prior to that one Civil Suit No. 108 of 1977/75 of 1980 was filed by one Rana Muneshwar Singh for restraining the Defendants from starting mining operation on the plots in question as well as on other plots. The said suit was disposed of by the trial court and it was held that the said two plots were not part of Pretshila hills. However, the said judgment of the trial court was set aside by the appellate court and the matter was remanded and thereafter, the suit was dismissed for default and as such that chapter came to an end.

7. It further appears that the matter has earlier come to this Court, also in M.J.C. No. 435 of 1989 regarding the aforesaid hills and other three hills and this Court, by interlocutory orders dated 15.12.1989 and 6.2.1990, directed that as the three hills--Ramshila, Pretshila and Brahmjoni had been declared protected monuments, no stone-crushing industry should be allowed to be located within a distance of 1/2 kilometer from the area so declared and any stone crushing industries located within such 1/2 kilometer area should be shifted. The said order was challenged before the Apex Court by the aggrieved persons and that was decided on 7.1.1991, which is reported in Surendra Kumar Singh and others

Vs. The State of Bihar and others, In the meantime, it appears that this Court disposed of the said M.J.C. application taking note of the said fact, and the order passed by this Court, the Apex Court noticed that 5.85 acres of land have been provided for the location of the stone-crushing industries about a kilometer from the area of the protected hills and in regard to Petitioners No. 8 and 10 before the Apex Court, who were intervenors before the High Court, directions were issued for shifting of their crushing machines in view of their stand before the Apex Court that they are ready to shift their crushing machines at the new place.

8. However, it is made clear that upto that time no notification u/s 3(3) of the Act had been issued after considering the objection on the basis of the notification dated 1.3.1985 issued inviting objections. One Rana Avinash Kumar Singh filed a writ application being C.W.J.C. No. 5682 of 1986 for a direction to the State Government to publish the final notification u/s 3(3) of the Act on the ground that inspite of issuance of notification dated 1.3.1985 u/s 3(1), no final notification has been issued. During the pendency of the aforesaid writ application, final publication was made on 7.5.1987 and the protected areas of said three hills were reduced, the result was that the two plots in question i.e. plots No. 1156 and 94, were not included within the protected area of Pretshila hills. It appears that in the notification u/s 3(1) of the Act, the total area of Pretshila hills proposed to be declared as protected area was 267.57 acres, but in the final publication dated 7.5.1987, the protected area was reduced to "163.17 acres. Similar reductions were made with regard to other hills. This Court, after hearing the parties, disposed of the writ application on 7.4.1998 and observed that as no objection was filed u/s 3(2) of the Act with regard to the area as mentioned in the preliminary notification, the reduction of the protected area, specially when there was no objection or without assigning any reason in the final publication, was unwarranted in the eye of law and, accordingly, the aforesaid notification dated 7.5.1987, which was annexed as Annexure 4 to the writ application, was quashed and the State Government was directed to issue a fresh notification after considering the objections, if any, received against the notification u/s 3(1) of the Act. This Court also directed that such notification must be issued by the State Government within a period of two months from the date of service or production of a copy of the order upon the State Government or the appropriate authority of the State Government. This Court further directed that till such notification was issued, the area of those hills as mentioned in the preliminary notification must continue to remain protected area.

9. It appears that the said order of this Court was not carried out and, thereafter, a contempt application being M.J.C. No. 2267 of 1999 was filed by the said Rana Avinash Kumar Singh before this Court. Two notifications; one issued on 22.12.1998 u/s 3(1) and the other issued on 16.7.2001 u/s 3(3) of the Act, were not found in accordance with the direction passed by this Court and, accordingly, the State Government in the show-cause stated that the aforesaid two notifications would be withdrawn and, thereafter, this Court, by order dated 27.8.2001, directed the Respondents to issue a fresh notification u/s 3(1) of the

Act fixing three weeks time for inviting objections and, thereafter, to take a final decision in the matter within three weeks thereafter and adjourned the matter to 5.11.2001. thereafter, the State Government issued a fresh notification on 10.9.2001 u/s 3(1) mentioning therein about the issuance of the earlier notification u/s 3(1) dated 1.3.1985 and invited objections with regard to the same in terms of Section 3(2) of the Act. It is to be stated that in this notification also, plots No. 1156 and 94 were included. Objections were filed by some of the writ Petitioners as well as other lease-holders doing mining operations on the aforesaid two plots. The said objections were filed before the Circle Officer, Town Gaya and the Circle Officer, Town Gaya, sent a report to the District Magistrate, Gaya, wherein he mentioned that the two plots are situated at a distance of 1 kilometer from Pretshila hills and recommended to exclude the said two (sic). Thereafter, the District Magistrate (sic) a report to the State Government and (sic) State Government after having considered the objection and the report, issued a notification on 21.2.2002, in which two plots (sic) also declared as protected area along with other plots, a copy of which has been Annexed as Annexure 15 to the L.P.A.

10. The case of the writ Petitioner-Appellants is that they are the holders of mining lease for carrying out mining operations on plots No. 1156 and 94 and they have challenged the notification issued u/s 3(3) of the Act on three grounds; firstly that the same was not finally published in terms of the statutory provisions and secondly that the plots are situated 1 kilometer away from Pretshila hills and as such the discretion exercised by the authority to declare the same as protected area is arbitrary, specially when some other plots intervening between the two have not been declared as protected area. They have also challenged the action of the State Government as arbitrary as no reason has been assigned to reject their objections while issuing the final notification u/s 3(3) of the Act. It appears that during the pendency of the writ applications the publication was made in the Official Gazette on 16.8.2002 and as such the writ Petitioner-Appellants have given up one of the aforesaid grounds.

11. The stand of the State, on the other hand, is that Pretshila hills were declared as archaeological monuments on 2.1.1981, which are situated on plots No. 72 and 273 under Khata Nos. 22 and 23, respectively, in the revenue village Chenna. Thereafter, a notification dated 1.3.1985 u/s 3(1) of the Act was issued on 12.3.1985 to declare certain plots of land as protected area for the protected monuments, namely, Brahmyoni hills, Ramshila hills, Pretshila hills and Vishnupad Temple. The two plots claimed by the Appellants were also included within the proposed area to be declared as protected area for the protected monuments called Pretshila hills. Several litigations cropped up with regard to the said matter. The State Government, accordingly, issued a notification u/s 3(3) of the Act, which was quashed by this Court and, thereafter, a fresh notification has been issued after considering the objections and, thus, the notification does not suffer from any legal infirmity.

12. At the outset, it is to be mentioned that there were other litigations also with regard to Pretshila hills and other hills, but reference has been made only to those cases, which are concerned with the issuance of the notification u/s 3 of the Act. Before advertng to the points raised on behalf of the Appellants, it is relevant and apt to state the relevant provisions of the Act, which is a State Act to provide for preservation of Ancient Monuments and Archaeological Sites and Remains other than those declared by or under law made by Parliament to be of national importance for the regulation of Archaeological excavations and for the protection of antiquities in the State of Bihar. Ancient monument and archaeological site and remains have been defined under Sections 2 and 2(e) of the Act. Section 3 of the Act empowers the State Government to declare ancient monuments etc., to be protected monuments and areas. Section 3 runs as follows:

3. Powers of State Government to declare ancient monuments, etc. to be" protected monuments and areas:

(1) Where the State Government is of opinion that any ancient monument or archaeological site and remains requires protection under this Act, it may, by notification in the Official Gazette, give two months" notice of its intention to declare such ancient monument or archaeological site and remains to be a protected monument or a protected areas, as the case may be; and a copy of every such notification shall be affixed in a conspicuous place near the monument or the site and remains, as the case may be.

(2) Any person interested in any such ancient monument or archaeological site and remains may, within two months after the issue of the notification, object to the declaration of the monuments or the archaeological site and remains, to be a protected monument of a protected area.

(3) On the expiry of the said period of two months, the State Government may, after considering the objections, if any, received by it, declare by notification in the Official Gazette, the ancient monument of the archaeological site and remains, as the case may be, to be a protected monument or a protected area.

(4) A notification published u/s (3) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the ancient monument or the archaeological site and remains to which it relates is a protected monument or a protected area for the purposes of this Act.

13. According to the said section, a kdraft notification has to be issued by the State Government of its intention to declare the ancient monument or archaeological site and remains to be a protected monument or a protected area and after publication of the draft notification, any person interested in any such ancient monument or archaeological site and re-pains may object to the declaration of the monuments or the archaeological site and remains, to be a protected monument or a protected area and after consideration of the objection, a notification has to be published u/s 3(3) declaring the ancient monument or

the archaeological site and remains to be a protected monument or a protected area. Thus, according to the said provision, only those persons, who are interested in such ancient monument or archaeological site and remains, have been given the right to raise objection. Section 18 of the Act provides restrictions on enjoyment of property rights in protected area and Sub-section (1) thereof provides that no person, including the owner or occupier of a protected area, shall construct any building within the protected area or carry on any mining, quarrying, excavating, blasting or any operation of a like nature without the permission of the State Government. However, proviso to the said sub-section provides that the said prohibition will not apply to an area, which is used for cultivation, if such cultivation does not involve the digging of more than one foot of soil from the surface. Thus, once an area is declared as a protected area under the Act, no mining operation can be carried out in the said area.

14. Learned Counsel appearing for the Appellants submitted that as the notification does not disclose any reason for rejecting the objection raised by them, the same is vitiated in law. It is further submitted that this Court in M.J.C. No. 435 of 19.89 had ordered that no stone crushing industry should be allowed to be located within a distance of 1/2 kilometer from the area so declared as protected monument and as the aforesaid two plots are one kilometer away from the Pretshila hills, the issuance of the notification declaring them as protected area is contrary to the aforesaid direction of this Court, specially when the said direction was upheld by the Apex Court in the aforesaid Surendra Kumar Singh's case (supra). Thirdly, it is submitted that the Central Government vide notification under Rule 32 of the rules framed under the Ancient Monuments and Archaeological Sites and Remains Rules, 1959, has declared the prohibited and regulated areas only to the extent of 200 meters, whereas, in this case, while declaring the protected area, the land situated beyond 200 meters has been included in the protected area, which also shows arbitrariness.

15. Learned Counsel appearing for the State, on the other hand, submitted that, the order is not arbitrary, their objections were considered and, thereafter, the impugned order has been passed. This apart, at their request, the area was measured and their objections with regard to declaration of the protected area were also considered and this Court has found that the objections raised by them are not worth acceptance and, accordingly, rejected their prayer. It was also submitted that there was no question of vitiation of the direction of this Court issued in the aforesaid M.J.C. application. In that case, a direction was issued by the Apex Court not to operate mining operations within 1/2 kilometer from the protected monuments. There, the question of declaration of the protected area in terms of Section 3 of the Act was not matter for adjudication. The Appellants cannot take benefit of the declaration made under the Central Act.

16. The notification issued u/s 3 of the Act is a subordinate legislation and it has statutory force and as such in absence of any specific provision, the principle of natural justice cannot be resorted to while issuing the notification u/s 3(3) of the

Act. However, Sub-section (2) thereof provides for filing an objection and consideration of objection is provided under Sub-section (3) and as such the persons covered under Sub-section (2) are entitled to consideration of their objections before the issuance of notification u/s 3(3) of the Act. Sub-section (2) of Section 3, as quoted above, clearly provides that the persons interested in the concerned ancient monument or archaeological site and remains may object to the declaration of the aforesaid monuments or site or remains to be a protected monument or a protected area. The writ Petitioner-Appellants, admittedly, do not fall in that category. They are not interested in the ancient monument or archaeological site or remains, on the other hand, they are the persons, who are carrying out mining operations in the area and as such they are not entitled in law to file objections in terms of the provisions contained under the Act. Be that as it may, as they have filed objection and on that basis a report was called for and, then after consideration of the same the notification in question has been issued, now the question for consideration is as to whether absence of any reason in the notification for rejection of their objection will vitiate the notification.

17. No doubt, when the power is conferred on any statutory authority including a delegatee under a valid statute, the same has to be exercised reasonably and the exercise of power is subject to judicial scrutiny. To decide the question as to whether the power has been exercised in accordance with law or not, some reasons are to be indicated, but so far as this case is concerned, on that ground, the notification cannot be assailed for reasons stated hereinafter. The Appellants were given full liberty by the learned Single Judge to indicate the reasons or grounds in their objection to the declaration of the two plots as protected area and they raised two objections; firstly that the said two plots are situated at a distance of more than 1 kilometer from Pretshila hills and secondly that some of the plots or lands are intervening between the Pretshila hills and the aforesaid two plots, have not been included in the protected area. By order dated 3.9.2002, this Court ordered "It would be in the interest of justice to have the distance of the two plots from Pretshila Hills ascertained scientifically so that the court may atleast have the correct facts before it while examining application of the provisions of law and the earlier orders passed by the courts". Accordingly, a scientific measurement was done by one R.S. Singh, Epigraphical Officer, Art, Culture and " "Youth Department and other officers and they have submitted a report. As per the report, Pretshila hills consist of plots No. 272 and 273 and distance from plot No. 273 to plot No. 1156 is 996 meters and distance from plot No. 272 to plot No. 1156 is 955.80 meters. Similarly, distance from plot No. 272 to plot No. 94 is 836.20 meters. A copy of the said report has been annexed as Annexure "C to the supplementary counter-affidavit filed on 3.10.2002 on behalf of the State in the writ application.

18. With regard to other objection raised by the writ Petitioner-Appellants that there are intervening lands between Pretshila hills and the aforesaid two plots, by order dated 3.4.2003 this Court directed the learned Counsel for the State

Government to seek instruction in the matter and file an affidavit indicating reasons why some plots falling between the two have not been declared as a protected area. Thereafter, the State Government filed another counter-affidavit, wherein it was stated that some of the plots, which have not been declared as protected area and are falling between Pretshila hills and the said two plots, are the agricultural lands and in possession of the agriculturists and some of the plots are Anawad Bihar Sarakar, which have been encroached by various persons and on some plots there are school" buildings but a decision has also been taken to declare them as a protected area Land they will soon be declared as part of protected area.

19. Declaration of a protected area under the Act vests in the State Government, which power, no doubt, has to be exercised reasonably and bona fide and not in an arbitrary manner. There is no dispute that Pretshila hills are a sacred place and the same have to be protected and the surrounding area is also to be protected for preservation of Pretshila hills, which is to be decided by the State Government and as the State Government, after having considered the matter, has declared the said two plots also a protected area, the objections raised by the Appellants concerning the said notification are not tenable in law. The Appellants cannot insist that the protected area should not extend beyond 1/2 kilometer from the protected monument, specially when admittedly mining operations are carried out on the said two plots. So, the decision taken by the State Government to include the areas up to 1 kilometer from the protected monuments so as to declare them as a protected area cannot be said to be an arbitrary exercise of power. So far as other objection is concerned, the State Government is already going to include other areas, about which complaint has been made by the Appellants. This apart, the said plots fall in different categories as part of the same is agricultural land, which is protected by proviso to Section 18(1) of the Act and over the remaining part, there is a public building and encroachment, for which steps have been taken as stated above.

20. There is also no question of violation of the earlier direction of this Court in the aforesaid M.J.C. case as at the relevant time there was no declaration of protected area u/s 3 of the Act and as such this Court has directed that no mining operation is to be carried out within 1/2 kilometer from the ancient monuments. If once a declaration has been made in accordance with the provisions of the Act, the same has to be given effect to.

21. So far as the point raised on behalf of the Appellants that the protected area should have been confined only to 200 meters as has been declared in the case of the Monuments governed by the Central Act, a copy of which has been annexed as Annexure 16 to the L.P.A. is concerned, we find that the notification was issued under Rule 32 of the Rules after considering the objection with regard to other monuments and as such the same cannot be taken to be a guideline for declaring the protected area under the said Act. Considerations for declaration of protected or regulated area under the Central Act may be different than the

criteria prescribed for declaring a protected area under the Act.

22. In the result, we do not find any merit in all these appeals and they are, accordingly, dismissed.